SFAMA
Swiss Funds & Asset Management Association

AIFMD: SFAMA Information Paper

CONTENT

A. CISA revision: the swiss response to AIFMD

Not only EU has developed new regulations in the field of collective investments schemes ("**CIS**"). In 2011 Switzerland has initiated a partial revision of its Collective Investment Schemes Act ("**CISA**") in order to enhance the investor protection, to increase the competitiveness of Switzerland and to ensure that Swiss alternative investment fund managers have access to the important EU AIF market. For more details about this revision, please refer to our "**CISA Center**" under: https://www.sfama.ch/kagcenter

a. Asset Management

i. Management companies and fund managers

In the system of the CISA it is necessary to distinguish between the management company ("*Fondsleitung*", "*Direction*") and the asset manager ("*Vermögensverwalter kollektiver Kapitalanlagen*", "*gestionnaire de placements collectifs de capitaux*"). **The asset manager acts normally as delegated of an "originally manager", like for instance a management company (contractual fund) or a SICAV. The revised CISA introduces however the possibility for an asset manager to act as "originally manager" of a foreign CIS. In this case, the competences and duties of an asset manager will be comparable of those of a management company. Only in this case fund managers based in Switzerland will have functions witch are equivalent of those of an AIFM**.

ii. License for fund managers

Under the previous Swiss regime only the managers of Swiss CISwere required to obtain an authorisation from the FINMA. Swiss managers of foreign funds could apply for FINMA authorisation provided that: (i) their registered office or domicile was in Switzerland, (ii) that foreign legislation required that they be subject to a supervisory authority and (iii) that the foreign CIS which they manage were subject to supervision of an equivalent standard to that required in Switzerland. This voluntary application for authorisation was put in place to allow Swiss asset managers of non-Swiss undertakings for collective investments in transferable securities to apply for FINMA authorisation. In reality only a limited number of jurisdictions have been recognised by FINMA as offering an equivalent standard of supervision.

Many of Swiss founders of alternative investment funds have set up their products offshore, or have established offshore asset management entities.

The new version of the CISA extends licensing obligations to cover all Swiss-based investment managers, including those of foreign AIFs. According to Article 7 para. 4 CISA, in the case of single investor funds, FINMA may exempt them from the duty to subject to supervision. Even under the new regulatory regime investment advisors have still no licensing obligations.

As a consequence, Swiss managers of foreign funds have to report to FINMA before 31 August 2013 (art. 158 c CISA: "*Asset managers of foreign collective investment schemes which now are also subject to this Act must report to FINMA no later than six months after the amendment of 28 September 2012 has come into force (1 March 2013).* ***They must meet the statutory requirements no later than two years after this amendment*** *has come into force and apply for authorisation. They may continue their activities until a decision regarding their application has been reached. In special cases, FINMA may extend the time limits given").*

Asset managers of CIS with their registered office in Switzerland may be:

a. legal persons in the form of companies limited by shares, partnerships limited by shares or limited liability companies;
b. general and limited partnerships.

Please note that individuals and cooperatives (*Genossenschaften*) cannot obtain a licence as a Swiss asset manager of CIS.

While Swiss domiciled asset managers must be regulated by FINMA, Swiss branches of foreign asset managers also require licensing by FINMA, which will only be granted if:

- **the foreign asset manager (including its Swiss branch) is subject to rules equivalent to the rules under the CISA;**
- **the applicable foreign licensing requirements are equivalent to those under the new law, and**
- **there is an agreement in place regarding the cooperation and exchange of information between FINMA and the foreign regulator(s) supervising the foreign asset manager (and the Swiss branch).**

A de minimis rule does exist. The FINMA interprets this rule as being applicable only for Swiss asset managers of foreign funds (see FINMA Newsletters 48, p. 3: http://www.finma.ch/e/finma/publikationen/Lists/ListMitteilungen/Attachments/59/finma-mitteilung-48-2013-d.pdf). Therefore no authorization is required in the case of asset managers that manage foreign CISs the assets of which do not exceed CHF 100 million (with or without leverage) or CHF 500 million (without leverage), the so-called de

minimis rule. There is now also the possibility of applying to voluntarily come under the supervision of FINMA if this is required in the country in which the CIS is established or distributed.

iii. Asset Management Functions

Please note that in general, asset and risk management are exercised by the management company/SICAV which primary object is the conduct of fund business. In addition it may provide discretionary management of individual portfolios; investment advisory services and safekeeping and technical administration of CIS.

The CISA allows asset manager of CIS to be responsible for the asset management and the risk management of the relevant CIS. The asset managers may also offer other activities such as investment advice, asset management for individual portfolios, distribution and representative functions. They can also perform administrative activities but only when they act as delegated from a management company.

The asset manager is only responsible for the Asset and Risk management if he exercises this task as primary managementactivity.

Please note that **in case fund management services are being offered by Swiss asset managers to foreign CIS, an agreement on cooperation and exchange of information between FINMA and the competent foreign regulator must be in place.**

Please note that **for CIS subject to simplified distribution in the EU under a specific treaty, investment decisions may not be delegated to the custodian Bank or to other companies whose interest may conflict with those of the fund management company or the investors.**

iv. Asset management Organisation

An Asset Manager will need to have **a minimum share capital of CHF 200,000 and a level of capital of at least a quarter of their fixed costs**.

There is a requirement for the Board of Directors ("**BoD**") to have the required experience and qualifications in areas of risk management and compliance. The BoD must have at least three members, the majority of whom are not active in the operation of the company and at least one third of whom are independent. There are additional requirements around segregation of control functions duties and, as you would expect, a reinforced profile for the compliance function. Please see the corresponding FINMA Newsletters 34-35:
http://www.finma.ch/e/finma/publikationen/pages/finmamitteilungen.aspx

Asset managers that already hold an authorisation will need to comply with the new organisational, capitalisation and equity requirements within one year from the entry into force of the CISA, i.e. by 28 February 2014.

v. Delegation resp. sub delegation of Asset Management

The delegation of asset management is possible when the delegation fulfils the following conditions:

- proper administration of the fund;
- proper instruction, supervision and control of the party assuming the delegated tasks.

Investment decision competences shall only be delegated to asset managers that are subject to prudential supervision by FINMA or an equivalent foreign authority.

Further, **a delegation of investment decisions to a foreign asset manager is only permitted if there is an agreement regarding the cooperation and exchange of information between FINMA and the competent foreign regulator(s)** (unless FINMA grants an exemption).This rule applies for management companies but also for asset managers. (See Art. 18 Abs. 4 and Art. 31 Abs. 4 CISA).

Investment decision competences shall not be delegated to the depositary bank of such CIS or to companies with interests that could conflict with the interests of the fund Management Company or investors.

Please note that **the fund management company remains liable for the conduct of the mandated persons to which it delegated asset management services**.

b. Custody

The Management Company in a SICAV has to appoint the Custodian. In an contractual Fund, the Custodian is part of the contract.

The necessary conditions have been put in place to achieve comparability with the new EU requirements ("to the same effect"). Custodian banks qualify as licensees of CISs and must satisfy several requirements. **The custodian**

bank must not only be a bank in accordance with the Swiss Banking Act, it must also have an appropriate organization for its activity as a custodian bank of CISs. This rule is not new but has been formally specified in the new version of CISA.

The use of sub-custodians had always been permitted. There is, however, a new definition of the requirements they have to comply with (Art. 73.2, first sentence, para. 2bis). The new provision regarding the liability of the custodian bank when appointing a sub-custodian (Art. 145.3) states that **a licensee that delegates a task to a third party is liable for any damages caused by that third party unless the licensee can prove that he applied the due care required by the circumstances with regard to selection, instruction, and monitoring of the sub-custodian (reversal of the burden of proof).**

There is also the requirement to inform investors in the prospectus of the risks entailed in the delegation of tasks to sub-custodians. There is also a new formal requirement on custodian bank activities in respect of Swiss investment companies with variable capital (SICAVs). Every Swiss SICAV must have a custodian bank, although certain exemptions may be granted by FINMA (Art. 44a para. 2).

Finally, it is important to note that **custodian banks will henceforth have to obtain a supplemental authorisation should they wish to act as a foreign funds' representative**.

Custodian banks must satisfy the new organisational requirements and, if applicable, submit an authorisation request as a foreign funds' representative within a one-year transitional period.

c. Distribution

In the new CISA, the former concept of "public advertisement" has been replaced by that of "distribution". **Distribution of funds includes "any form of offering or advertising pertaining to funds that is not exclusively addressed to investors in the sense of article 10 paragraph 3 letters a and b", i.e. regulated financial intermediaries, such as banks, securities dealers, fund management companies and asset managers of funds, as well as regulated insurance undertakings.**

Conversely, any offering or advertising to other types of qualified investors, as for instance high net worth individuals or pension funds, is considered as distribution.

The CISA foresees a certain number of exceptions. The provision of information and the acquisition of funds is not deemed to be distribution:

- **in the context of a written discretionary asset management agreement with a regulated financial intermediary, such as a bank;**
- **upon incitation or initiative of the investor, in particular in the context of an advisory agreement; or**
- **in the context of a written discretionary asset management agreement with an independent asset manager, provided the latter fulfils a certain number of conditions.**

The following are considered as **qualified investors** according to the new CISA:

- regulated financial intermediaries;
- regulated insurance undertakings;
- public entities and pension funds with professional treasury operations;
- companies with professional treasury operations;
- high net worth individuals having requested in writing to be considered as qualified investors (opting-in clause).The CISO defines the high net worth individual as an investor, who demonstrates (i) having the necessary knowledge to understand the risks of the investment based on his/her education or professional experience or a comparable experience in the financial sector and (ii) owning assets of at least CHF 500'000; or confirms in writing owning assets of at least CHF 5 million. Please note that high net worth individuals, who do not "opt-in" by 31 May 2015 will no longer be allowed to invest in funds reserved for qualified investors;
- investors having concluded a discretionary asset management contract in line with the requirements referred to above, unless they have declared in writing that they do not wish to be considered as qualified investors (opting-out clause).

The new definition of qualified investors is entered into force on 1 June 2013.

Please note that **entities having distribution activities must be authorised by the FINMA**. They will therefore have to contact FINMA by 31 August 2013 and fulfil the new requirements and file a request for authorisation by 28 February 2015. This applies even in case of distribution of foreign funds to qualified investors only, although distributors subject to an appropriate supervision in their home country do not require an (additional) distribution authorisation from FINMA.

Furthermore, **a new requirement shall apply to distributors as from 1 January 2014**: Licensees and third parties involved in distribution shall keep a written record of the client's objectives, as well as the reasons why a subscription

of a specific collective investment scheme was recommended. This written record shall be given to the client. This requirement to keep records will, at least initially, apply only to the distribution of fund units, and not to structured products, equities, or bonds. The Swiss Banking Association and the SFAMA have prepared guidelines which are the process of being approved by the FINMA.

As already foreseen under the previous CISA, **a foreign fund which is distributed in Switzerland to non-qualified investors requires an authorisation and must amongst other things nominate a Swiss representative. The new Version of CISA has extended this obligation to foreign funds distributed to qualified investors other than regulated financial intermediaries or insurance undertakings**. These foreign funds have until 28 February 2015 to nominate a representative. In addition, the new version of the Collective Investment Schemes Ordinance ("CISO") requires that the representative enters into (a) Swiss law distribution contract(s) with the distributor(s).

Concerning the **authorisation for foreign funds distributed in Switzerland to non-qualified investors, please note that an agreement for cooperation and exchange of information has to be concluded between the foreign authorities concerned by the distribution and FINMA**. FINMA is expected to soon publish the list of countries with which it has entered into such agreement.

Art. 20.1c also entails an important amendment concerning the distribution: All licensees and their agents must provide investors with enhanced information on the CISs concerned. This refers also to all costs charged directly and indirectly to the CIS, such as any trailer and brokerage fees in the form of hard and soft commissions, if any.

B. Management of AIFs under AIFMD

a. Scope of AIFMD

Please note that AIFMD is marked as text with EEA relevance. Therefore the EEA Joint Committee is required to amend the EEA Agreement with a view to permitting simultaneous application of the Directive in the EEA States (which includes all 27 EU countries plus Iceland, Liechtenstein and Norway). The Directive is incorporated into the EEA Agreement and it is expected that all EEA States would agree to and implement the Directive in their legislation → <u>All references to EU AIFs / EU AIFMs would therefore extend to EEA AIFs / EEA AIFMs in such circumstances.</u>

<u>AIFMD will impact you if you:</u>

- have alternative Investment Management activities with the EU;
- have AIF domiciled in the EU (regardless of the location of your investment management activities);
- market your AIF to European Investors (regardless of the domicile of your Fund or location of your investment management activities).

<u>AIFMD is not applicable to:</u>

- Non-EU AIFM which manages anon-EU AIF marketed outside the EU.

AIFMD is intended to regulate fund managers. AIFMD sets out rules for authorization, ongoing operation and transparency of AIFM. These rules require major changes to the structures, strategies and operations of fund managers and alternative investment funds.

AIFMD doesn't regulate the funds. However the definition of what is an AIF is detailed in the AIFMD and the ESMA Guidelines on the type of AIF and thus the AIFMD applies indirectly of products (see point H. iii Level 3, "Guidelines on key concepts of the AIFMD") and is necessary to delimit the scope of the directive.

The scope of AIFMD is extremely wide. **<u>AIFMD applies to any legal person appointed by or on behalf of the AIF whose business is managing one or more AIFs</u>**.

According to AIFMD, **an AIF is a collective investment undertaking (which is not a UCITS), which raises capital from a number of investors with a view to investing it in accordance with a defined investment policy. Such a fund will be an AIF regardless of whether it is open or closed-ended and whatever its legal structure (limited partnerships, limited liability partnerships and limited liability corporations).It is important to note that, in its guidelines, ESMA insisted that there must be the existence of a legally enforceable restriction to raise capital from one single investor. A structure which happens to have just one investor but whose legal documentation did not restrict the capital raising to a single investor would be regarded as having a number of investors**.

According to the recital 7 of AIFMD, investment undertakings, such as family office vehicles which invest the private wealth of investors without raising external capital, should not be considered to be AIF.

Please note that **the Swiss Collective Investment Schemes are not recognised as UCITS Funds and therefore are considered to be AIF under AIFMD as long as they are distributed in EU.**

AIFMD doesn't apply to:

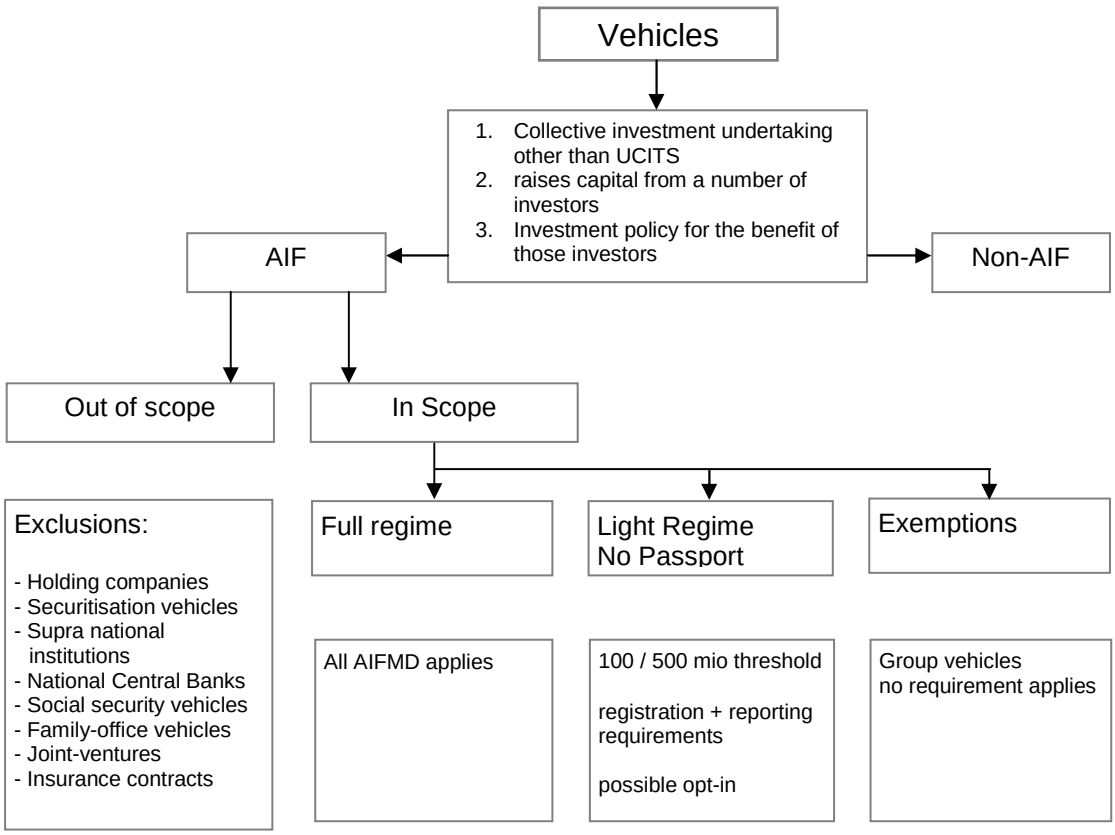
- non EU-AIFM managing or marketing a Non-EU AIF outside the EU (art. 2, a contrario interpretation);
- holding companies (Article 2(3)(a));
- institutions covered by the directive on the activities and supervision of institutions for occupational retirement provision (IORP)5 (Article 2(3)(b));
- supranational institutions, such as World Bank, IMF, ECB, EIB, European development finance institutions (DFIs) and bilateral development banks, EIF, other supranational institutions and similar international organizations (Article 2(3)(c));
- national central banks (Article 2(3)(d));
- national, regional and local governments and bodies or other institutions which manages funds supporting social security and pensions systems (Article 2(3)(e));
- employee participation schemes or employee saving schemes (Article 2(3)(f));
- securization special purpose entities (Article 2(3)(g)).

The following actors are in scope but exempted:

- AIFM that manage one or more AIF whose only investors are: the AIFM; the parent undertakings or subsidiaries of the AIFM; or other subsidiaries of those parent undertakings, provided that none of those investors itself is an AIF (Article 3(1)).

The following actors can benefit from a light regime (registration and reporting requirements):

- AIFM managing smaller AIF, that is to say, AIFM managing AIF which are not leveraged and without redemption rights for a period of 5 years and with aggregate assets under management below 500 million Euros and AIFM managing AIF whose assets under management, including any assets acquired through the use of leverage do not exceed 100 million euros (art. 3) (for the calculation of AuM: please refer to Art. 2 and f. Level 2). Please note that AIFMs that qualify for the lighter regime may choose to opt-in to the full AIFMD regime.

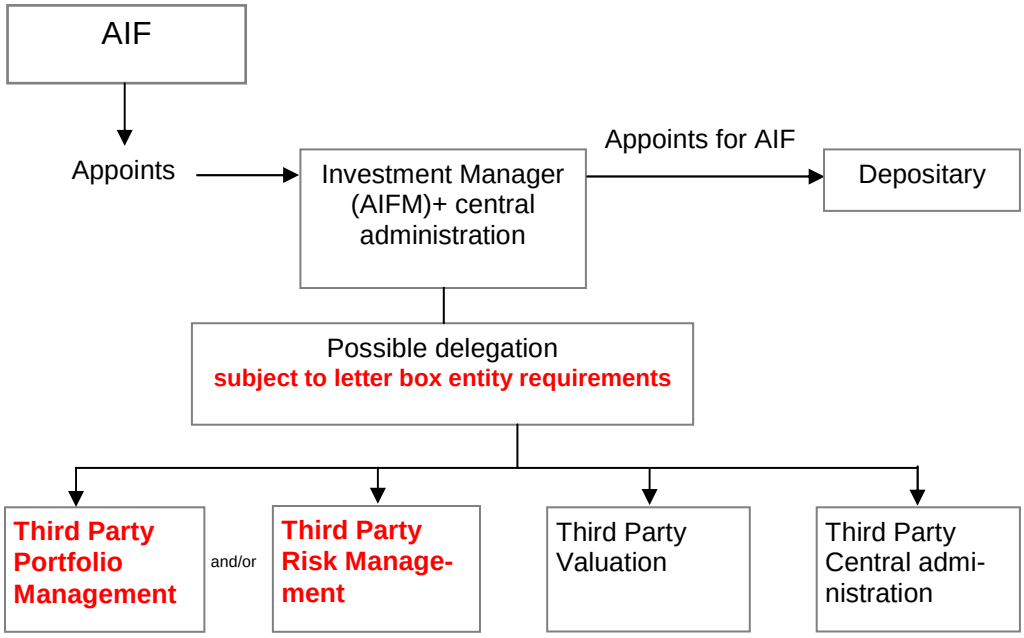


According to AIFMD, **"managing an AIF" means providing risk management and/or portfolio management services to AIF**. In addition, the AIFM may also provide Administration, Marketing and Activities related to the assets of AIF.

The AIFM is the entity which has the responsibility for each function and has sufficient substance to oversee both, but it may delegate either function to another entity, subject to stringent rules. The AIFM can be an external manager appointed by or on behalf of the AIF, provided that the delegator doesn't become a "letter-box entity. The AIFM can be the AIF itself ("self-managed AIF") provided that: (i) the legal form of the AIF permits internal management (e.g., SICAV) and (ii) the AIF's governing body chooses not to appoint an external AIFM.

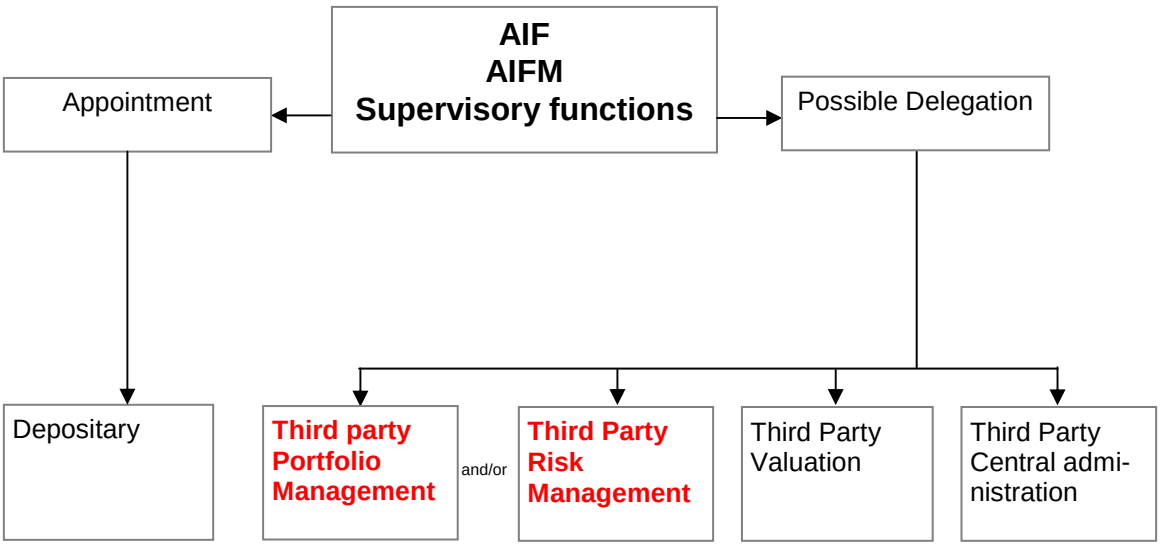
External Manager

- **Enables the alternative investment group to retain control over the AIF and to delegate the AIFM responsibility to a third party**



Self-Managed AIF

- **The AIF designates itself as internally-managed, if the structure allows to do so**



b. Interferences between UCITS, AIFMD and MiFID

UCITS and AIFMD

AIFMD (art. 6.2) provides that an AIFM may also act as a management company for UCITS provided the AIFM is authorised in accordance with UCITS Directive for that activity. UCITS IV permits UCITS management companies to manage non-UCITS CIS.

With AIFMD, a UCITS management company which manages AIFs and which is appointed as the AIFM for the purposes of the AIFMD will no longer be subject to the UCITS Directive for that activity and will instead be required to obtain an additional authorisation under the AIFMD.

It will also be possible for a UCITS management company to provide services, including investment management services, to AIFs but not to be the appointed AIFM – this is because, for example, the AIF is internally managed or the UCITS management company provides administration services and the selected AIFM is the investment manager to the AIF. In this case all of the UCITS management company's activities will continue to be covered by its authorisation under the UCITS Directive and it will not need to seek authorisation under the AIFMD.

It will be possible for a single entity to hold both a UCITS and AIFMD authorisation. Moreover, both UCITS and AIFMD permit firms to be additionally authorised to provide discretionary portfolio management, including investment advice and safe-keeping and administration of units in collective investment undertakings. AIFMD additionally allows AIFMs to be authorised to provide receipt and transmission of orders. This is not an additional activity which is permitted for UCITS management companies in the UCITS Directive. ESMA is of the view that AIFMs which are also UCITS management companies should be able to carry out this additional activity under their AIFMD authorisation, provided conflicts of interest are taken into account.

AIFMD gives Asset Managers an incentive to review their management company structures. They have the possibility to manage UCITS and non-UCITS funds using a single management company. The tendency is growing to develop the UCITS Manco that could comply with AIFMD. Using a UCITS Manco for both types of investments can realize a lot of benefits (reducing the costs, saving capital, boosting efficiency and reducing tax). A lot of firms have already idea how they may be able to rationalise management entities. In order to identify the optimal number and location of the management companies, the firms have to take into account the following factors:

- tax considerations;
- costs of reorganisation;
- personal preferences;
- political considerations;
- regulatory fatigue;
- how much autonomy firms give their local subsidiaries.

Please note that **restructuring management companies will not necessary suit every firm but it offers significant advantages to some**. Its firm needs to take a judgment based on its characteristics.

MiFID and AIFMD

AIFMD states that investment firms authorised under Directive 2004/39/EC ("**MiFID**") and credit institutions authorised under Directive 2006/48/EC ("**Banking Consolidation Directive**") are not required to obtain authorisation under the AIFMD to provide investment services such as individual portfolio management to AIFs. This allows MiFID firms and credit institutions to continue to provide services to AIFs under delegation arrangements.

Article 6(2) states that no external AIFM can engage in activities other than those referred to in Annex I of the AIFMD and the additional management of UCITS. By way of derogation, Article 6(4) permits an AIFM to provide portfolio management services to clients including AIFs where it is not the appointed AIFM. The AIFM may also provide non-core services to clients i.e. investment advice, safekeeping and administration and receipt and transmission of orders.

A firm which is authorised under MiFID or under Banking Consolidation Directive cannot be the appointed AIFM for an AIF nor obtain authorisation under the AIFMD. The AIFMD allows dual authorisation only in the case of AIFMs and UCITS management companies. However, according to Article 6(8) of the AIFMD, MiFID firms and credit institutions may provide investment services such as individual portfolio management in respect of AIFs. In this respect, the thresholds in Article 3(2) are not relevant since in any case the entity concerned – be it a MiFID firm or a credit institution – would not be considered as an AIFM under AIFMD.

The debate on the interaction between AIFMD and MiFID continues. Unlike the UCITS Directive, which provides passporting rights for all activities (including MiFID services) carried on under the UCITS Directive, AIFMD only gives explicit passporting rights for managing and marketing AIF.

Please note that **EU asset management groups that have a UCITS management company within their group should aim to have that UCITS management company authorised as their AIFM; and EU asset management**

group that do not have a UCITS management company within their group and are passporting services through a MiFID firm should consider whether there is an entity other than the MiFID firm that could become authorised as its AIFM or whether to establish a new entity to act as AIFM.

Many MiFID companies in asset management groups will be carrying out activities which cannot be passported under either AIFMD or UCITS, so that it will continue to be necessary to maintain a MiFID company within the group for those activities.

c. AIFM's Operating conditions

Capital requirements

Internally managed AIF must have initial capital of at least 300.000 Euros; externally appointed AIFM must have initial capital of at least 125.000 Euros. They must have also additional own fund equal to 0.02% of the amount by which the portfolio of AIFs exceed 250 million Euros, subject to an overall limit of 10 million Euro.

Please note that **AIFMD allows Member States to authorise AIFM to provide up to 50% of the required additional own funds with a guarantee from a credit institution or an insurance undertaking that has a registered office either in an EU Member State or in a third country with equivalent prudential regulations**.

The own funds of the AIFM must exceed a quarter of the previous year's fixed overheads.

The Portfolio of AIF only includes those AIF for which the AIFM is the appointed AIFM and excludes assets managed on a delegated basis.

Own funds must be invested in liquid assets or assets readily convertible to cash in the short term and should not include speculative positions.

Both externally appointed AIFM and internally managed AIF must have either additional own funds or professional indemnity insurance to cover potential liability risks arising from professional negligence.

Additional own funds must equal 0,01% of the value of the portfolios of AIF managed, valuing derivatives at market value. The AIFM competent authority may be able to lower this to 0,008% on the basis of historical loss data for a 3 year period, or may increase this amount if it is not satisfied that the AIFM has sufficient additional own funds to cover professional liability risks.

Professional indemnity insurance needs to cover 0,9% of the value of the portfolios of AIFs managed for claims in aggregate per year and 0,7% of the value of the portfolios of AIF managed per individual claim. The Regulation requires AIFM to establish policies and procedures for operational risk management, to be reviewed at least on an annual basis.

Organisational requirements

The AIFM must identify conflict of interest that may arise between it and the AIF managed or its investors, between the several AIF under management or between the investors of different AIF under management. The AIFM has to implement procedures in order to identify, prevent, manage, monitor and disclose to investors of the AIF conflicts of interest that may arise. In order to avoid conflicts of interest, AIFM have to segregate tasks and responsibilities that may be regarded as incompatible.

Moreover the AIFM must have appropriate human and technical resources proportional to the size and complexity of their business. We invite you to analyse the AIFMD requirements on this point. The organisation requirements are largely inspired from UCITS and MIFID directives (separate compliance function and internal audit function, application of the proportionality principle, monitoring of investments, record keeping requirements…).

Remuneration

The Remuneration rules applying for senior management, risk takers and control functions discourage risk-taking which is inconsistent with the risk profile or fund rules of the AIF. The fixed and variable components of the remuneration should be appropriately balanced and at least 50% of any variable remuneration should consist of shares/units in the AIF concerned. At least 40% of variable remuneration is deferred for a minimum of 3 to 5 years.

Finally AIFM that are significant in term of size or assets should have a remuneration committee.

Please note **the ESMA Guidelines on Sound Remuneration (see Point I – Level 3) apply also to third countries in the case of a delegation of the portfolio management and risk management activities to a third country. In its implementation guidelines on sound remuneration policies ESMA clearly indicates that entities to which portfolio management and/or risk management activities have been delegated must be subject to regulatory requirements on remuneration that are equally as effective as those applicable under the AIFMD or subject to**

the remuneration requirements of the AIFMD through appropriate contractual arrangements. The remuneration requirements will not necessary impact the entire firm of non EU manager or sub-delegates but the compensation of those identified staff performing portfolio or risk management activities on behalf of the EU AIFM. ESMA provides details on who should considered as an identified staff.

d. Delegation of AIFM functions

An AIFM must have **objective reasons** for delegating any of its functions to third parties (art. 20 AIFMD; art. 76-82 Level 2 AIFMD). The delegate must have sufficient resources and good repute and experience and **the delegation cannot result in the AIFM becoming a letter-box entity**!

Letter box entity is defined in art. 82 of Level 2 AIFMD. In order to avoid becoming a letter-box entity, an AIFM should:

- Retain the necessary expertise and resources to supervise the delegated tasks effectively and manage the risks associated with the delegations;
- Have the power to take decisions in key areas which fall under the responsibility of the senior management and have the power to perform senior management functions in particular in relation to implementation of the general investment policy and investment strategies;
- Have put in place the contractual rights to inquire, inspect, have access or give instructions to its delegates;
- An AIFM is a letter-box entity if the totality of the individually delegated tasks substantially exceeds the tasks remaining with the AIFM.

AIFM' s compliance with AIFMD shall not be undermined by the Delegation. AIFM shall ensure on an on-going basis that the delegate carries the function effectively and in accordance with laws and regulatory requirements. AIFM compliance with AIFMD is not undermined by the delegation.

AIFM shall ensure the continuity and quality of delegated tasks. A written agreement shall define clearly the rights and obligation of the AIFM and the delegate. The agreement must provide a right of immediate withdrawal of the delegation. If portfolio management delegated, it shall be in accordance with the investment policy of the AIFM.

The competent authority has the power to assess the delegation and chain of delegates in accordance to qualitative criteria:

- The types of assets the AIF or the AIFM acting on behalf of the AIF is invested in and the importance of the assets managed under delegation for the risk and return profile of the AIF;
- The importance of the assets under delegation for the achievement of the investment goals of the AIF;
- The geographical and sectoral spread of the AIF's investments;
- The risk profile of the AIF;
- The type of investment strategies pursued by the AIF or the AIFM acting on behalf of the AIF;
- The types of tasks delegated in relation to those retained and;
- The configuration of delegates and their sub-delegates, their geographical sphere of operation and their corporate structure including whether the delegation is conferred on an entity belonging to the same corporate group as the AIFM.

Only tasks regarded as important are subject to delegation rules (not administrative or technical functions).

It is very important to note that these criteria will require a case-by-case analysis to evaluate the element of "substantial" delegation. The Commission will monitor the application of the delegation provisions and ESMA may issue guidelines to ensure a consistent assessment of delegation structures across the EU. In the meantime, we have to take into consideration the different interpretation of the EU jurisdictions (art. 20.7 AIFMD).

If the delegation concerns portfolio management and /or risk management there is also an additional authorisation for the delegate who must be regulated for the purpose of asset management or at least be authorised by the competent authority of the home State member (necessary cooperation arrangements with third countries).

Please note that **the remuneration requirements apply to third countries within the delegation structure.**

e. Other requirements

Risk and Liquidity Management

The AIFM has to ensure that risk management is functionally and hierarchically separate from operations, including portfolio management, and will be required to implement adequate risk management systems to identify, measure, manage and monitor all risks that each AIF is exposed to (using appropriate stress-testing procedures).

The AIFM has to set a maximum leverage limit for each AIF managed that should be disclosed in the AIF offering documents. This maximum level should be set by taking into account the investment strategy, the sources of leverage, the need to limit the exposure to a single counterparty and the extent of collateral. The total amount of leverage employed by the AIF will need to be disclosed to investors on a regular basis. The competent authorities may impose limits on the level of leverage that an AIFM is entitled to employ based on concerns regarding systemic risk and disorderly markets.

AIFMD details the role and responsibilities of the AIFMs permanent risk management function and defines the conditions to be satisfied in order to ensure the functional and hierarchical separation of risk management. These include that the persons in risk management should not be supervised by the head of operating units, including portfolio management, and that they should not perform activities within the operating units.

The AIFM will need to have an adequately documented risk management policy covering all risks faced by the AIFs and will need to set quantitative or qualitative risk limits for each AIF covering market, credit, liquidity, counterparty and operational risks. Risk measurement includes requirements for back-testing, stress testing and scenario analyses and the rules also require remedial actions for breaches of limits. The risk management systems should be subject to an annual review by the senior management.

AIFMD sets out requirements for liquidity management for all open-ended AIFs and those AIFs which use leverage, to ensure that investors should be able to redeem their investments in line with the AIF redemption policy. **The AIFM will need to monitor the liquidity risk within the AIF and regularly conduct stress tests under normal and exceptional liquidity circumstances. In terms of AIF liquidity management AIFMD specifies that each AIF needs to maintain an appropriate level of liquidity taking into account investor profile, size of investments and redemption terms. The AIFM will need to monitor the liquidity risk of the AIF portfolios and set liquidity limits where appropriate to be monitored on an ongoing basis.**

Depositary

The AIFM is required to appoint a depositary for each AIF managed. The AIFM could not act as depositary.

AIFMs managing non-EU AIFs that are not marketed in the EU are not subject to the depositary requirements.

The depositary is responsible for properly monitoring the AIFs cash flows, safe-keeping (possible delegation to a third party, subject to certain conditions – art. 21.11 AIFMD) and record-keeping of assets and oversight of certain operational functions.

Non-EU AIFs managed by non-EU AIFMs are not required to comply with the depositary requirements unless the non-EU AIFM elects (in late 2015, at the earliest) to register in the EU to obtain the benefit of the marketing passport.

All EU AIFs must have a depositary in the EU country where the AIF is established. However, where a non-EU AIF is managed by an EU AIFM a limited exemption is available ("depositary-lite" regime). These rules require that where the non-EU AIF is marketed in the EU via national private placement regimes, one or more entities must be appointed to fulfil certain of the depositary activities, but the detailed AIFM Directive provisions on depositary liability, delegation and who can be a depositary will not apply. Instead, the entities that are appointed must be responsible only for (1) monitoring the AIF's cash-flows, (2) ensuring that the AIF's assets are held in custody appropriately, and (3) overseeing the sale, issue, repurchase, redemption and cancellation of units or shares of the AIF.

There is a complete exemption from the depositary requirements in the AIFMD where an EU AIFM manages a non-EU AIF and where that AIF is not marketed in the EU.

When the marketing passport is extended to non-EU AIFs in 2015, the full range of depositary rules will apply to any AIFs that are managed by EU AIFMs and marketed using the passport; if the EU AIFM continues to market that AIF using private placement rules, then the depositary-lite rules would still be available.

Please refer to art. 21 Level 1 and art. 83 and f. Level 2 for more details on these three functions.

We would like to draw your attention on the depositary Bank liability Regime.

AIFMD foresees two scenarios for which the depositary is liable: the loss of financial instruments held in custody, and other losses suffered as a result of the depositary's negligent or intentional failure to properly fulfil its obligations.

Financial instruments required to be held in custody are wide and include any transferable securities, money market instruments or units in collective investment undertakings, which are capable of being registered or held in the name of the depositary. Derivatives and assets directly registered in the name of the AIF with the issuer itself are excluded. Real estate interests will also not be financial instruments for these purposes.

The “loss of a financial instrument held in custody” is deemed to take place in three situations:

1) where the ownership right no longer exists or never existed;
2) where the financial instrument exists but the AIF has definitively lost its ownership right; and
3) where the AIF has the ownership right, but cannot dispose of it on a permanent basis.

The depositary shall be liable to the AIF or to the investors of the AIF for the loss by the depositary or a third party to whom the custody of financial instruments was delegated. **In case of loss of a financial instrument held in custody, the strict liability requires the depositary to return a financial instrument of identical type or the corresponding amount of cash to the AIF without undue delay. The depositary will be exempted from liability if it can prove that the loss of a financial instrument has arisen as a result of an external event, which fell beyond reasonable control, and was unavoidable despite all reasonable efforts to the contrary. An external event beyond reasonable control that would delineate liability is limited to natural events, acts of government, war, riots or major upheavals.**

A contractual liability exclusion is only possible if the depositary can prove that:

- the requirements for delegation of custody tasks were met;
- a written contract between depositary and third party exists which expressly transfers the liability and allows to make claims against that third party and
- a written contract between the depositary and the AIF/AIFM provides the objective reason to expressly contract such a discharge.

AIFMD also specifies the “objective reason” which is necessary for the contractual discharge of liability by the depositary. The depositary needs to demonstrate that it had no other option, but to delegate its custody duties to a third party (for example, the law of the third country requires that certain financial instruments are held in custody by a local entity and local entities exist that satisfy the delegation criteria of the AIFMD).

The depositary is also liable for any other loss as a result of the depositary’s negligent or intentional failure to properly fulfill its obligations. There is no possibility to discharge this liability. The strict liability regime covers cases of fraud, accounting errors, operational failure and failure to segregate assets held in custody by the depositary or by a third party to whom custody has been delegated.

Valuation

The AIFM is required to ensure that appropriate and consistent procedures are in place for a proper and independent valuation of the assets of each AIF under management.

An AIFM must ensure that the valuation function is performed either by itself or an external valuer. Please pay attention that in both cases the AIFM remains liable for proper valuation.

The depositary cannot be appointed as the external valuer, unless there is functional and hierarchical separation of functions and that potential conflicts of interest are properly managed.

The appointment of the external valuer shall comply with delegation rules. The external valuer does not delegate the valuation function to a third party.

Disclosure and reporting requirement

AIFM must make available certain information to investors before they invest. Please refer to art. 23 Level 1 and art. 108 and 109 Level 2.AIFMD also contains annual reporting provisions. Please refer to art. 22 Level 1 and art. 103-107 Level 2.

Moreover AIFMD foresees that AIFM have to provide certain information regularly to their competent authority on each AIF under management. Please refer to art. 24 Level 1 and art. 110 and 111 Level 2.

f. Authorisation process

i. EU-AIFM

For **EU-AIFM**, the **head office and the registered office of the AIFM will need to be located in the same Member State. The AIFM will have to apply to its home competent authority for authorisation. AIFMs performing activities under AIFMD before 22 July 2013 have the possibility to submit an application for authorisation within 1 year (grandfathering). Please note that in the interim the European Commission expects AIFM to use best efforts to comply with relevant provisions. Some Regulators consider the grandfathering provision as absolute**.

Please note that **new EU-AIFM of non EU Funds have to comply with AIFMD there is a lighter depositary regime if the marketing takes place in EU and there is no depositary or annual report requirement if no marketing in EU**.

The filing will need to contain information related to the Manager, to the AIF and also additional information if AIFM wants to manage EI AIFs established in other Member States. Please refer to articles 6, 7 and 8 Level 1.

Check List for the Authorisation Process

- Information of the persons effectively conducting the business of the AIFM, the senior management, their good repute and experience in the AIF investment strategies;
- Information on the identities of the AIFM's shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and on the amounts of those holdings;
- Programme of activity setting out the organisational structure of the AIFM, including information on how the AIFM intends to comply with its obligations under chapters II, III, IV and where applicable Chapters V, VI, VII and VIII;
- Information on the remuneration policies;
- Information on arrangements made for the delegation and sub-delegation to third parties of functions as referred to in art. 20 Level 1;
- Information about the investment strategies;
- Information on where the Master AIF is established if the AIF is a feeder AIF;
- Fund rules or incorporation documents;
- Depositary arrangements;
- Disclosure to investors;
- The Member State in which it intends to manage AIF directly or establish a branch;
- A programme of operations stating services to be performed;
- List of AIF it intend to manage;
- Organisational structure of the branch, name and contact details of the branch management, branch address.

ii. Non-EU AIFM seeking authorisation to manage EU AIFs

As from 2015, non-EU AIFM will have the possibility, subject to a decision from the EU authorities, to benefit from the EU Management Passport.

Non-EU Manager will have to be authorised. They have to make an application to the competent authorities in an EU "Member State of Reference" ("MSR") to become authorised to manage EU AIFs (for the definition of MSR, see the Commission Regulation 448/2013, Point H, Level 2).

FINMA approval as such is not sufficient. The AIFM has to comply with all the provisions in the AIFMD.

There will need to be appropriate co-operation arrangements ensuring efficient exchange of information between the competent authorities of the MSR, the competent authorities of the EU AIFs and the competent authorities in the non-EU country where the manager is established. This non-EU country cannot be on the FAT F list of 'Non-Cooperative Countries and Territories', must have signed a tax information exchange agreement with the MSR, and its laws and regulations must not prevent effective supervision by the competent authorities.

Please note that **before 2015, some Regulators provide that if a non EU AIFM is marketing an AIF in EU before 22 July 2013, this AIFM may continue to manage and market that AIF until 22 July 2014 on the basis of domestic placement law (different national rules)**.

Non EU AIF with a Non EU AIFM will fall outside the scope of AIFMD when the final closing has taken place by AIFMD transposition; if the final closing is not achieved at this time, AIFMD will apply where an actual offering or placement is made to professional investors in the EU an subject to any transition disposition by Member States. AIFM must comply with updated private placement rules until 2018 or from 2015 with the passport system and in this case will have to be authorised by MSR.

C. Marketing of AIF under AIFMD

a. Marketing

From 2013 AIFMD permits EU AIFM to market EU AIF with a passport to professional investors across the EU.

At a later stage (probably 2015) and under certain conditions AIFMD will be extended to permit EU AIFM to market non EU AIF with a passport and non EU AIFM to market EU and non EU AIF.

Before the passport is available, the marketing is possible through Private Placements Rules ("PPR") if these apply in the respective jurisdiction in the EU Member States. To the extent that these continue to exist, an AIFM must satisfy certain conditions. In the long term the intention is to abolish such domestic regimes and replace them with the EU passport. Please note that each EU Member State is free to decide to abolish the

existing PPR in advance of 2018, or to impose additional restrictions (for more details on the existing PPR please refer to point G).

Marketing means any direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares in an AIF it manages **to or with professional investors domiciled or with a registered office in the EU**». The reverse solicitation is out of scope. The definition of reverse solicitation is not clear and will depend from jurisdictions to jurisdictions.

We also would like to draw your attention to the fact that the Swiss CISA does not have the same approach regarding marketing/distribution. While for the clients with any mandate (discretionary or advisory), the approach is the same, that is to say, promotion activities are regulated and reverse solicitation is out of scope.

The situation is different in the two following cases:

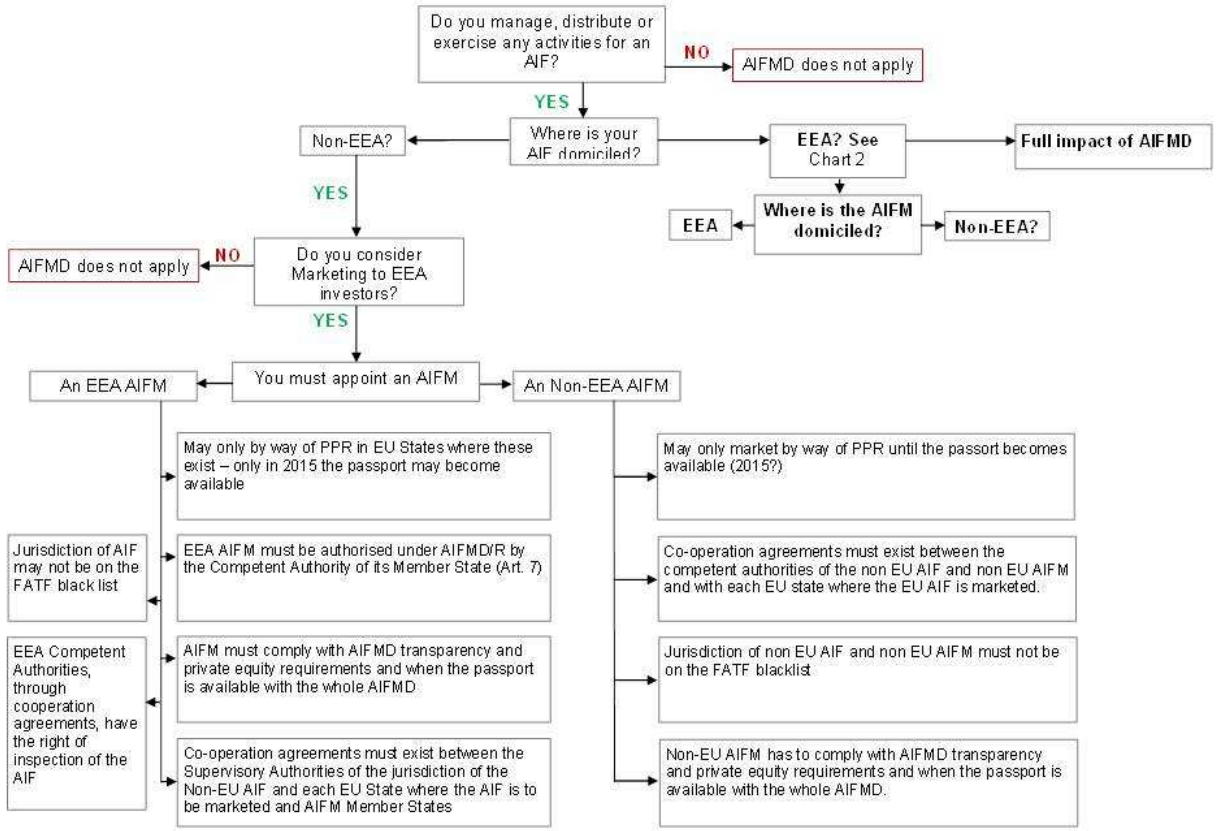
- Clients with a written advisory mandate
  This activity is out of the scope of CISA. In AIFMD it is the contrary. The consequence is that there will be no proposal of AIF (including Swiss Funds) to EU clients if AIF do not benefit from PPR or passport.

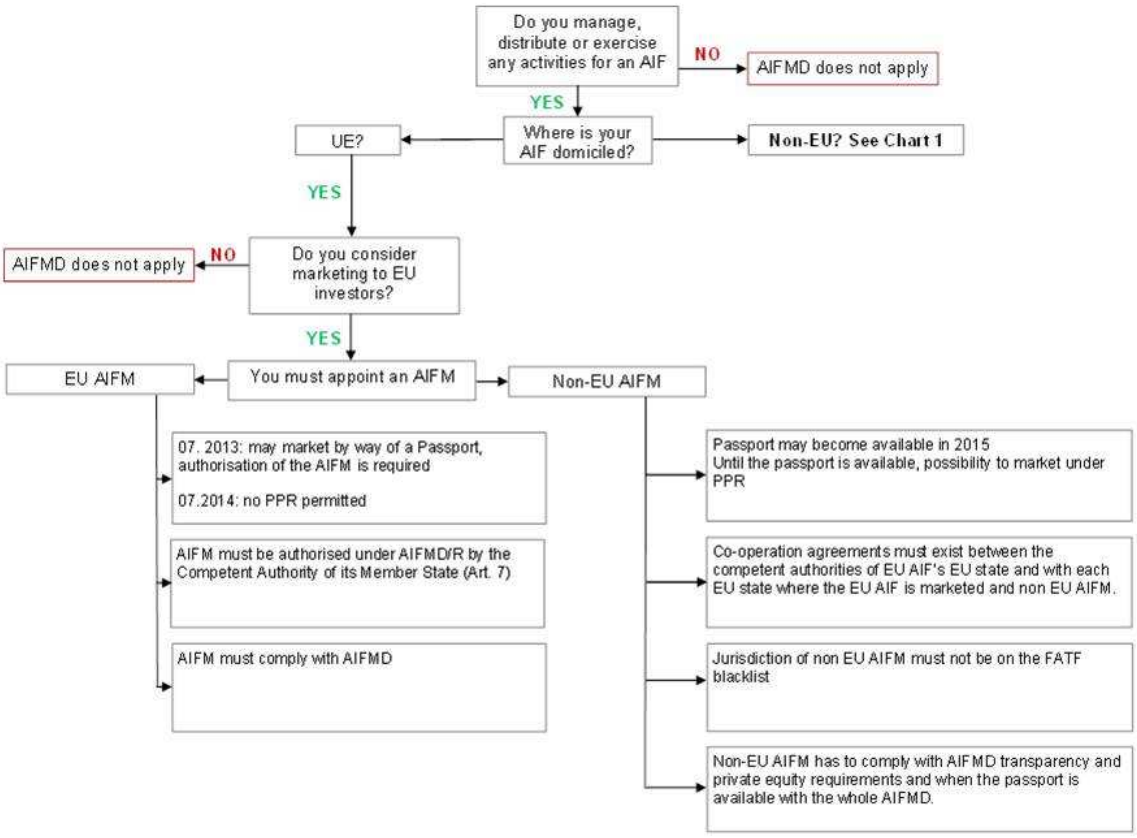
- Clients with a discretionary portfolio management mandate
  This activity is out of scope in CISA but in AIFMD it is not clear. If it is in scope, same issues as for clients with an advisory mandate.

b. Timeline

	EU AIF	Non EU AIF
EU AIFM	**07. 2013**: passport available but authorisation required (art. 31.1 – art. 32.1) – **full compliance with AIFMD** **2014**: passport only applies - no private placement permitted – **full compliance with AIFMD**	**2013**: no passport available (art. 35 – art. 67.6). Permitted private placement (art. 36) if: target Member State allows; cooperation arrangements in place between AIF third country, AIFM Member State and target Member State; and AIFM **complies with AIFMD transparency and private equity requirements;**AIF not in non – cooperative FATF jurisdiction (art. 36.2) **2015**: passport may become available if positive opinion of ESMA and EU consent; AIFM must be authorised by its MSR; AIF countries have agreed cooperation arrangements with EU AIFM home regulator has given consent (art. 35.2 – art. 35.3 and 35.5) **full compliance with AIFMD** **2018**: end of private placement regime in member states, subject to delegated legislation (68.6)
Non EU AIFM	**2013**: no passport available; permitted private placement (art. 42.1) if target Member State allows; cooperation arrangements in place between AIFM third country, AIF Member State and target Member State and AIFM **complies with AIFMD transparency and private equity requirements** **2014**: no passport available - permitted private placement. **2015**: passport may become available – provided that AIFM becomes authorised (art. 39.1) and AIF country to have agreed cooperation arrangements with EU (art. 39.2 and 39.4) – **full compliance with AIFMD** **2018**: end of private placement regime in member states, subject to delegated legislation (68.6)	**2013**: no passport available (art. 40.1 and art. 67.6) – private placement permitted if target Member State allows; cooperation arrangements in place between AIF and AIFM third country and target Member State; and **AIFM complies with AIFMD transparency and private equity requirements** **2014**: permitted private placement **2015**: passport may become available if positive opinion by ESMA and EU consent and AIFM and AIF countries has agreed cooperation arrangements with EU (art. 40.1 – art. 40.5) – **full compliance with AIFMD** **2018**: end of private placement regime in member states, subject to delegated legislation

c. Charts


Do you manage, distribute or exercise any activities for an AIF?
NO
AIFMD does not apply
YES
Where is your AIF domiciled?
Non-EEA?
EEA? See Chart 2
Full impact of AIFMD
YES
EEA
Where is the AIFM domiciled?
Non-EEA?
AIFMD does not apply
NO
Do you consider Marketing to EEA investors?
YES
An EEA AIFM
You must appoint an AIFM
An Non-EEA AIFM
May only by way of PPR in EU States where these exist – only in 2015 the passport may become available
May only market by way of PPR until the passort becomes available (2015?)
Jurisdiction of AIF may not be on the FATF black list
EEA AIFM must be authorised under AIFMD/R by the Competent Authority of its Member State (Art. 7)
Co-operation agreements must exist between the competent authorities of the non EU AIF and non EU AIFM and with each EU state where the EU AIF is marketed.
EEA Competent Authorities, through cooperation agreements, have the right of inspection of the AIF
AIFM must comply with AIFMD transparency and private equity requirements and when the passport is available with the whole AIFMD
Jurisdiction of non EU AIF and non EU AIFM must not be on the FATF blacklist
Co-operation agreements must exist between the Supervisory Authorities of the jurisdiction of the Non-EU AIF and each EU State where the AIF is to be marketed and AIFM Member States
Non-EU AIFM has to comply with AIFMD transparency and private equity requirements and when the passport is available with the whole AIFMD.


Do you manage, distribute or exercise any activities for an AIF
NO
AIFMD does not apply
YES
Where is your AIF domiciled?
UE?
Non-EU? See Chart 1
YES
AIFMD does not apply
NO
Do you consider marketing to EU investors?
YES
EU AIFM
You must appoint an AIFM
Non-EU AIFM
07. 2013: may market by way of a Passport, authorisation of the AIFM is required
07.2014: no PPR permitted
AIFM must be authorised under AIFMD/R by the Competent Authority of its Member State (Art. 7)
AIFM must comply with AIFMD
Passport may become available in 2015
Until the passport is available, possibility to market under PPR
Co-operation agreements must exist between the competent authorities of EU AIF's EU state and with each EU state where the EU AIF is marketed and non EU AIFM.
Jurisdiction of non EU AIFM must not be on the FATF blacklist
Non-EU AIFM has to comply with AIFMD transparency and private equity requirements and when the passport is available with the whole AIFMD.

D. AIFMD Compliance: Passport versus PPR

a. Under the PPR

Under the PPR Regime AIFMD imposes certain transparency and disclosure obligations. Please note that AIFM allows Member States to have stricter rules. We recommend you to check the national private placement rules in details.

AIFMD Transparency requirements

- Annual Report

  - ✓ EU/Non EU AIFM must provide an annual report for each AIF they market in the EU. The annual report must be made available to the regulator in each target Member State (accounting information must be prepared in accordance with the accounting statements of the country where the AIF is established and be audited).

  - ✓ The annual report must be provided to EU investors on request.

  - ✓ Audited annual reports must be available no later than six months from the end of the financial year.

  - ✓ The annual report must include:
    - a balance-sheet or a statement of assets and liabilities;
    - an income and expenditure account for the financial year;
    - a report on the AIF's activities over the financial year, e.g. overview of investment activities; summary of the portfolio and performance;
    - any material changes in the pre-sale disclosures to investors;
    - total amount of remuneration for the financial year, split into fixed and variable remuneration, paid by the AIFM to its staff;
    - where relevant, carried interest paid by the AIF.

  - ✓ The aggregate amount of remuneration broken down by senior management and members of staff of the AIFM whose actions have a material impact on the risk profile of the AIF.

  - ✓ Additional private equity disclosures (if applicable).

- Disclosure to investors

  - ✓ Pre-sale disclosures to investors include:
    - investment strategy, objectives, restrictions and risks of the AIF;
    - circumstances in which the AIF may employ leverage, including the types and sources of leverage permitted and any associated risks;
    - AIF's valuation procedure and pricing methodology;
    - AIF's liquidity risk management, including redemption rights in both normal and exceptional circumstances, and existing redemption arrangements;
    - latest annual report;
    - fees, charges and expenses;
    - how fair treatment of investors is ensured (including, potentially, detailed side letter disclosures);
    - information on latest valuations and prices;
    - information on historic performance.

  - ✓ Periodic post-sale disclosures to investors cover:
    - percentage of the AIF's assets subject to special arrangements;
    - arising from their illiquid nature;
    - new arrangements for managing liquidity of the AIF;
    - current risk profile of the AIF and risk management systems employed by the AIFM to manage those risks.

  - ✓ In the case of AIFs employing leverage, regular post-sale disclosures for each such AIF cover:
    - any changes to the maximum level of leverage which the AIFM may employ on behalf of the AIF;
    - any changes to any right of the reuse of collateral or any guarantee granted under the leveraging arrangement;
    - the total amount of leverage employed by that AIF.

- Reporting to regulators

  - ✓ AIFMs must regularly report to the regulator on (for each AIF it markets in the EU):
    - the main instruments and markets, the principal exposures and most important concentrations;

- the percentage of the AIF's illiquid assets which are subject to special arrangements;
- any new arrangements for managing the liquidity of the AIF;
- the current risk profile (including market risk and liquidity profiles) of the AIF and the risk management systems employed by the AIFM to manage the market risk, liquidity risk, counterparty risk and other risks including operational risk;
- the main categories of assets in which the AIF invested including the corresponding short market value and long market value, the turnover and performance during the reporting period.

✓ Frequency
- dependent on size of AUM;
- half-yearly for AIFMs managing portfolios of AIFs whose AUM in total exceed the Small AIFM thresholds but do not exceed €1 billion;
- quarterly for AIFMs managing portfolios of AIFs > €1 billion;
- quarterly for Small AIFMs;
- annually for AIFMs in respect of each unleveraged AIF under their management which invests in unlisted EU companies and issuers to acquire control;
- deadline is 30 days after period end (additional 15 days for fund of funds).

Private equity requirements: investments in unlisted companies

- <u>Notification of major holdings</u>

✓ Competent authorities must be notified of the proportion of voting rights in non-listed companies, which have their registered office in the EU, held by the AIF when the proportion reaches or crosses the thresholds of 10%, 20%, 30%, 50% and 75%.

- <u>Disclosure in case of acquisition of control</u>

✓ When an AIF acquires, individually or jointly, control over a non-listed company, the AIFM managing the AIF must notify:
- the unlisted company (this must request the board of directors to inform the employee representatives);
- the shareholders of the company; and
- the home Member State regulators of the AIFM.

✓ Investors and competent authority must be provided with details of the financing of the transaction.

✓ Within 10 working days of acquiring control of an unlisted company the AIFM is required to disclose:
- the shareholdings after the acquisition;
- the conditions under which control was reached, including information about the identity of the different shareholders involved;
- the identity of the AIFM(s) which either individually or in agreement with other AIFMs manage the AIF(s) that have reached control;
- information on the financing of the transaction;
- the policy for preventing and managing conflicts, in particular between the AIFM, the AIF and the unlisted company;
- its policy on external and internal communication, relating to the company in particular and its employees; and
- a non-listed company and its shareholders must be told of the intentions with regard to the future business plan and the likely repercussions on employment.

- <u>Asset stripping</u>

✓ AIFMD imposes restrictions on distributions (including dividends and interest on shares), capital reductions, share redemptions or purchases of own shares by 'controlled' portfolio companies during the first two years of ownership.

✓ An AIFM cannot facilitate, support or instruct any of the above actions and must use its best efforts to prevent them.

✓ Provisions place restrictions on the AIFM for two years from acquisition of control. However, AIFMD doe not state that these restrictions only apply to the AIFM for so long as the AIF(s) it manages continue to control the portfolio company.

b. With the Passport

If a Swiss manager wants to benefit from the marketing passport system (possibly in 2015), then full compliance with AIFMD is required. This would lead to an important review of existing fund documentation, inter alia, you will have to reflect the following points in your documents:

- Appropriate remuneration policies;
- Delegation policies (please note that the Swiss managers are not affected by any delegation or sub-delegation).

E. Swiss Asset managers and AIFMD: Investment management activities for EU Funds, delegation tasks from an EU AIFM to swiss entities, advisor function (Impacts for the Swiss Industry)

Investment management activities for EU/non-EUAIF

You have to be a regulated asset manager in CH:

- Manager of all foreign funds require licensing unless the funds are exclusively open to qualified investors and these funds have during the past two years in aggregation not exceeded 100 m AuM (including leverage) or 500 m AuM but do not engage in leverage and are closed for the first 5 years or investors are exclusively member firms belonging to the same group as the Swiss based asset manager (art. 13 CISA – art. 2.2.h CISA – art. 2 bis CISA).

- New definition of distribution: (art. 3 CISA and art. 3 CISO).

- Representative/paying agent required (art. 123 CISA).

- Guidelines for asset manager published by the FINMA (notifications 33, 34, 35 and 36).

- Management of EU AIF:
  - before 2015: management permitted if AIF Member State allows;
  - 2015: authorisation by MSR (where AIF marketed or authorised), must comply with AIFMD for passport.

- Management of Non-EU AIF:
  - 2015: if passport sought, authorisation by MSR (where AIF Marketed or authorised), must comply with AIFM for passport;

- Marketing in the EU: see rules under PPR and under Passport (see Point D and E).

Delegation tasks from an authorised EU AIFMs

The rules set out in AIFMD are resumed under Point C, d.

The most important consequence for the Swiss manager acting as delegate is the application of remuneration requirements. In its implementation guidelines on sound remuneration policies ESMA clearly indicates that entities to which portfolio management and risk management activities have been delegated must be subject to regulatory requirements on remuneration that are equally as effective as those applicable under the AIFMD or subject to the remuneration requirements of the AIFMD through appropriate contractual arrangements.

As there is no equally effective regulatory requirements in Switzerland, we recommend you to check that the contractual arrangements between the AIFM and the delegate are appropriate.

The ESMA guidelines may help you about the approach to disclosure (see point I – Level 3).

Advisor Functions

In structures where the key functions of an asset manager – portfolio management and risk management – are performed outside Switzerland, Swiss advisors may continue in their present advisory role and will not be subject to the new licensing obligation.